IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-378

JAMES BROCKINGTON,

Petitioner,

—vs—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

RAYMOND A. BROWN,
Counsel for Petitioner,
26 Journal Square,
Jersey City, N.J. 07306.

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

Cases Cited

United States Constitution Cited

Statutes Cited

Rule Cited

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The Petitioner, James Brockington, respectfully prays that a Writ of Certiorari issue to review the Judgment of the Superior Court of New Jersey, Appellate Division, entered in the above case on March 16, 1976. Certification was denied by the New Jersey Supreme Court on June 15, 1976.

Opinion Below

The opinion of the Superior Court, Appellate Division appears in the Appendix annexed hereto and has not been officially reported as yet.

Jurisdiction

The judgment of the Superior Court, Appellate Division, was entered on March 16, 1976. Certification was denied by the New Jersey Supreme Court on June 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and §1257(3).

Question Presented

Have Petitioner's rights to due process under the Fourteenth and Sixth Amendments been violated where Petitioner was illegally sentenced to a term in excess of the statutory maximum, and in excess of the contemplated plea bargain, and where, upon resentence after serving a portion of the original sentence, Petitioner was sentenced to a term in excess of the contemplated plea bargain under the Multiple Offender Statute?

Statutory Provisions Involved

Statutory provisions involved are N.J.S.A. 24:21-29; N.J.S.A. 24:21-24; N.J.S.A. 24:21-19(a)(1); N.J.S.A. 24:21-20; N.J.S.A. 24:21-19(a); R. 3:9-2; other statutory provision cited is Federal Rule of Criminal Procedure, 11.

Statement of the Case

Petitioner was charged in a four count indictment with conspiracy to violate the narcotics law of New Jersey, N.J.S.A. 24:21-24; distribution of cocaine, N.J.S.A. 24:21-19(a)(1); possession of cocaine, N.J.S.A. 24:21-20; and possession with intent to distribute, N.J.S.A. 24:21-19. At a *retraxit* hearing on September 11, 1974, Petitioner withdrew his plea of not guilty to the second count charging distribution of cocaine, at which time the State indicated it would dismiss the remaining counts of the indictment (Tr. 9/11/74, lines 2-5).

> ". . . It is a four count indictment, and it is my understanding that the defendant is going to plead guilty to the count charging him with distribution of cocaine.
>
> Court: What count would that be?
>
> Spivack: The second count, sir.
>
> Court: Just the second count?
>
> Spivack: Yes, sir. The remaining counts will be dismissed upon sentencing."

Subsequent to these remarks Judge Leopizzi examined the Petitioner (Tr. 9/11/74, lines 7-9).

> Court: Has anybody told you what the sentence will be?
>
> Brockington: Yes, sir.
>
> Court: Well, they told you what the maximum sentence would be, which for distribution is 12 years imprisonment or a $5,000.00 fine, is that correct?
>
> Brockington: Yes, sir.
>
> Court: But they didn't tell you what the Court was going to do?
>
> Brockington: No, sir.

Court: You only know that it is the maximum sentence in connection with Count 2, which you are pleading to?

Brockington: Yes, sir, that's what I am speaking of.

On December 17, 1974, the plea judge, the Honorable Bruno L. Leopizzi sentenced Mr. Brockington to a term of 18-20 years.

On January 24, 1975, the Petitioner moved before the Honorable Richard B. McGlynn for a reduction of the sentence. (By this time Judge Leopizzi had been reassigned to another county.) At the time of Petitioner's motion, Judge McGlynn agreed that Judge Leopizzi had imposed a sentence which illegally exceeded the statutory maximum and which improperly exceeded the terms of the plea bargain. Judge McGlynn also took the position that Mr. Brockington had the option of being resentenced (possibly under the Multiple Offender Statute) or of withdrawing the guilty plea. Counsel for Mr. Brockington insisted that the Petitioner was entitled to have the terms of his original plea bargain enforced. Judge McGlynn rejected this position.

On February 13, 1975, Judge McGlynn set aside Judge Leopizzi's sentence as illegal and violative of the terms of the plea bargain and ordered that the Prosecutor comply with the procedures of the Multiple Offender Act. At this time he renewed his offer to Petitioner to withdraw his guilty plea. At the time of this second *retraxit* hearing, the Prosecutor who had been present at the original *retraxit* hearing indicated that it was his perception, as well as that of the original sentencing court and the Petitioner that the maximum penalty contemplated at the time of the original plea bargain was 12 years (Tr. 2/13/75, lines 7-12).

Cerefice: Well, you see now, if you are going to ask me that question, as I was thinking about it at the time the sentence was imposed, I'd have to answer you that I did not look into the statute prior to my conversation with Judge Leopizzi and was under the impression that the maximum was 12."

On March 18, 1975 defendant was sentenced by Judge McGlynn to 18-20 years, pursuant to the Multiple Offender Act. (It should be noted that defendant was incarcerated from the time of his original sentencing by Judge Leopizzi on December 17, 1974 until the time of his sentencing on March 18, 1975 by Judge McGlynn.)

Reasons for Granting the Writ

The Superior Court, Appellate Division, has rendered a decision in conflict with the applicable decisions of this Court guaranteeing to the defendant a right to a fair trial. The Court has recently recognized the growing importance of "plea bargains" in the administration of justice. *Santobello* v. *New York,* 404 U.S. 257, 264, 30 L. Ed. 2d 430 (1971).

> "However important plea bargaining may be in the administration of criminal justice, our opinions have established that a guilty plea is a serious and sobering occasion, inasmuch as it constitutes a waiver of fundamental rights to a jury trial. *Duncan* v. *Louisiana,* 391 U.S. 145, to confront one's accusers, *Pointer* v. *Texas,* 380 U.S. 400, to present witnesses in one's defense, *Washington* v. *Texas,* 388 U.S. 14, to remain silent, *Malloy* v. *Hogan,* 378 U.S. 1, and to be convicted by proof beyond all reasonable doubt, *In Re Winship,* 397 U.S. 358." *Id.* at 264.

It is respectfully submitted that any waiver of such an imposing array of rights must be made accordingly and with full understanding of the *consequences* of such an act. Where a defendant argues that a sentence or disposition is contrary to that for which he had fairly bargained, then a court must carefully scrutinize the facts and circumstances which give rise to such a claim.

An initial step in such a scrutiny must be to determine what were the reasonable expectations of the defendant at the time he entered into the plea bargain. This principle has been unequivocally endorsed by the Supreme Court of the State of New Jersey. *State* v. *Thomas,* 61 N.J. 314 (1972).

In *Thomas* the New Jersey Supreme Court prohibited the State from proceeding against a defendant on a murder indictment after that defendant had served 18 months of a sentence pursuant to a plea of guilty to a charge of atrocious assault and battery on the same victim. The Court in *Thomas* rejected the appellant's plea of double jeopardy. However, it prohibited the State from proceeding with the indictment on the theory that to do so would violate the defendant's reasonable expectations that his plea to assault and battery and serving of the subsequent sentence imposed would discharge his obligation to the State.

> "From an examination of the record made upon remand, we are convinced that the defendant anticipated that by pleading guilty to the atrocious assault and battery, and then serving whatever sentence might be imposed, he was terminating the incident and could not thereafter be called upon to account further. We think that under all of the circumstances, that this expectation was entirely reasonable and justified." *Id.* at 323.

Two years prior to the *Thomas* decision, the Superior Court, Appellate Division, had embraced a similar principle with respect to those expectations of a defendant which were generated by the comments of a trial judge. *State* v. *Poli,* 112 N.J. Super. 374 (App. Div. 1970),

> "The pertinent issue is whether defendant had a bona fide belief that such a promise was made, and whether that belief was reasonably based upon the conduct of all the parties concerned, including the plea judge." *Poli,* supra, at 380. (Emphasis supplied.)

Petitioner Brockington maintains that the sentence of 18-20 years initially imposed illegally by Judge Leopizzi and subsequently imposed pursuant to the Multiple Offender Act by Judge McGlynn unfairly violated his reasonable expectations concerning the maximum sentence which might be imposed upon him pursuant to his plea bargain. Petitioner Brockington furthermore requests that the Court order "specific enforcement" of the terms of the original plea bargain.

There is ample precedent for the proposition that a defendant is entitled to specific enforcement of the original terms of his plea bargain, where there has been a failure to meet his reasonable expectations. Chief Justice Burger in speaking for the Court in *Santobello* indicated that the options available for the Court in that case would be to vacate the sentence in accordance with the wishes of the Petitioner, or to order that the original terms of the plea bargain, envisioned by the defendant and the original prosecutor, be specifically enforced. The majority chose, however, to remand the matter to State court with directions that the State court should make the appropriate choice between these two options, *Santobello,* supra, at 263. In his concurring opinion, Justice Douglas agreed

with the Chief Justice's analysis of the options available and with the decision to remand to the New York court. However, Justice Douglas felt that the sentencing court should:

> "Afford defendant's preference considerable if not controlling weight . . ." *Santobello*, supra. at 267.

The concurring and dissenting opinions of Justices Marshall, Brennan and Stewart agreed with the majority and with Justice Douglas that the available options were vacation and specific performance. The dissenting justices apparently chose to defer Petitioner's request that the sentence be vacated and the matter remanded for trial.

The view that specific performance is a viable and just remedy in cases like those *sub judice*, is reinforced by the ultimate decision arrived at by the New York Court of Appeals in *Santobello*, *People* v. *Santobello*, 39 A.D. 2d 654, 331 N.Y.S. 2d 776 (1972):

> "Here, due process and the interest of justice will be fully served by a remand for resentence with the specific performance of the prosecutor's promise." *People* v. *Santobello*, supra, 777.

On the validity of the specific performance, see also *United States* v. *Graham*, 325 F. 2d 922 (6th Cir. 1963); *State* v. *Thomas*, supra; *State* v. *Poli*, supra; *People* v. *Selikoff*, 41 A.D. 2d 376, 343 N.Y.S. 2d, 386, aff'd. 36 N.Y. 2d 227 (1974); *People* v. *Smith*, 34 A.D. 2d 687, 306 N.Y. 2d 182 (1969); *Courtney* v. *State*, 341 Pa. 2d 610 (Okla. Cr. App. 1959).

Specific performance is a remedy available to a defendant whose reasonable expectations have been thwarted by a sentence or disposition contrary to the terms of the original plea bargain. Specific performance is a preferred remedy where a defendant has changed his position in reliance upon, or partial fulfillment of the terms of the original plea bargain (on reliance as a factor in determining the appropriateness of specific performance, see *Santobello*, supra, at 268, dissenting and concurring opinion; *Hicks* v. *United States*, 19 Cr. Law. Rptr. 2460, 8/9/76 —— U.S.D.C. Ct. Appeals ——; *People* v. *Selikoff*, supra.)

The majority of the N. Y. Court of Appeals in *Selikoff* denied the defendant's request for specific performance of a promise made at a *retraxit* hearing precisely because there had been no change in the defendant's position in reliance on the original terms of the plea bargain:

> "The absence of any showing of specific prejudice to the defendant, or change of position in reliance upon the guilty plea and none has been demonstrated in this record, he is in no position to object to this procedure (vacation and trial.)" *Id.* at 392.

Interestingly enough, the dissenter in *Selikoff* disagreed with the Court's conclusion, but was in accord on the principle that some change in the defendant's position in reliance on the original promise is the principal criteria for determining the applicability of specific performance:

> ". . . [R]eturning to the *status quo ante* is impossible in this case where co-defendants of this defendant have been tried and acquitted in the interim, and the defendant himself has waived his constitutional right against self-incrimination and has made a full disclosure of his involvement in the crime to the prosecuting attority and the police department . . . Thus, in reliance upon the Court's promise, he at the time and subsequently laid bare all the facts pointing to his culpability." *Id.* at 393.

State v. *Thomas*, supra, also stands firmly for the proposition that a defendant's reasonable reliance upon the original terms of the plea bargain should be given great weight in determining whether or not he is entitled to specific performance of that plea bargain. In the instant case, Petitioner Brockington was incarcerated from the time of his original sentencing on December 17, 1974 to the time of his sentencing by Judge McGlynn on March 18, 1975. Thus, he had served 12 weeks before he was finally given a legal sentence by Judge McGlynn. It would certainly be unfair to suggest that Mr. Brockington was faced with a reasonable choice, when he was told that he could withdraw his guilty plea and go to trial, after having served a portion of his sentence pursuant to the plea bargain. Certainly, he, like the defendant in *Thomas*, was under the apprehension that serving this time would be a manner of resolving all questions concerning his punishment. This apprehension was clearly the result of the reasonable expectations generated at the time of the original plea:

> "Court: Has anybody told you what the sentence will be?
>
> Defendant: Yes, sir.
>
> Court: Well, they told you what the maximum sentence would be, which for distribution is 12 years and/or a $5,000.00 fine. Is that correct?
>
> Defendant: Yes, sir.
>
> Court: But they didn't tell you what the Court was going to do?
>
> Defendant: No, sir.
>
> Court: You only know that it is the maximum sentence in connection with Count 2, the count you are pleading guilty to?
>
> Defendant: Yes, sir. That's what I am speaking of."

Thus, the defendant retracted his not guilty plea, entered a plea of guilty and subsequently began serving two months of his sentence as a consequence of his reliance on the statement of Judge Leopizzi that the maximum which could be imposed upon him was 12 years. Petitioner's plea of guilty was induced by what was in effect a misstatement of law applicable to him. (Irreparable damage was done when he was forced to serve a portion of his sentence before being given the opportunity to withdraw his guilty plea.) The failure to correctly inform the defendant of possible consequences of his guilty plea is clearly in violation of N.J. Court Rule R. 3:9-2 concerning the entry of guilty pleas. This rule requires that a court find that a guilty plea is entered voluntarily and "with an understanding of the nature of the charge and consequences of the plea."

An understanding of the consequences necessarily includes a knowledge of what sentences might be imposed as a result of a plea to the charge before the Court. See, *State* v. *Poli*, supra:

> "Finally, since no one indicated to defendant that such an additional sentence would be imposed as a result of his pleas, it is spurious to argue that such additional sentenced were outside the scope of his agreement. The basis of the probation violation was the guilty pleas, and without the pleas, there were no such violations. By reason thereof, fair play requires that the sentence for the violations of probation be made concurrent to the Middlesex County sentence." *Id.* at 381.

The decision in *Poli* was addressed to the actions of a trial court which sentenced a defendant on substantive crimes and consequent violations of probation. The probation violations which were factually the same, were

made to run consecutive with the substantive violations, contrary to the defendant's understanding of the trial judge's comments. In effect, *Poli* held that the consecutive sentence for violations of probation were consequences of his plea to the substantive crimes. Since the defendant's guilty plea was induced by a reasonable expectation that all of his sentences were to be concurrent, based on comments of the trial judge, the Appellate Division ordered that all his sentences be made concurrent to conform to his original understanding.

Clearly, the thrust of R. 3:9-2 is to protect the defendant from the imposition of sentences greater than those contemplated at the time of his original guilty plea. (Sentences under the Multiple Offender Statute here utilized are not for a substantive offense, but are additional sentences for the original offense. *State* v. *Staten*, 62 N.J. 935 (1943); *State* v. *Tyler*, 88 N.J. Super. 396 (1968), cert. den. 384 U.S. 992.) This interpretation of the Rule is buttressed by the tentative draft comment to the Rule which compares R. 3:9-2 to "the analagous Federal rule." *Pressler, Current N.J. Court Rules*, Tentative Draft Comment, R. 3:9-2. Federal Rule of Criminal Procedure 11(c)(1) specifically requires the trial court to advise a defendant who wishes to plead guilty of "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." For a similar interpretation of a statute requiring that a defendant be advised of a possible additional sentence which could be imposed after entering a guilty plea, see *People* v. *Schulman*, 13 E.D. 2d 441, 216 N.Y.S. 2d 998 (1961) interpreting *New York Code of Criminal Procedure, Section 335.A.* See also, *Gannon* v. *United States*, 208 F. 2d 772 (1953).

There were two crucial lapses in due process which caused harm to Petitioner in the procedures below. The first was the failure to warn Petitioner of a possible additional sentence which might be imposed after a plea to Count 2 of the indictment in question. The second was the fact that there was an excessive sentence imposed by Judge Leopizzi on September 17, 1974, also resulting in Petitioner's spending time for a term illegally and improperly imposed. It is Petitioner's contention that the question of culpability is irrelevant. The fact is that Petitioner suffered prejudice solely as the result of his reliance on his reasonable expectation generated at the time of his original plea bargain.

The failure of the court or the state to protect the Petitioner's right in either of these situations constitute a clear violation of Petitioner's Fourteenth Amendment right to due process. The failure of Petitioner's own counsel to warn him of the possible additional sentence served to deny Petitioner's Sixth Amendment right to effective representation by counsel as guaranteed by the Fourteenth Amendment. Furthermore, failure of Petitioner's counsel to object at the time of the imposition of the illegal sentence, causing Petitioner to serve time before he could be afforded an opportunity to withdraw his guilty plea, constituted a denial of Petitioner's Sixth and Fourteenth Amendment rights. See also, *Schulman* and *Gannon*, supra.

Petitioner originally entered his guilty pleas to Count 2 of the indictment with the understanding that the maximum penalty which could be imposed was 12 years imprisonment. This understanding was clearly shared by both Judge Leopizzi and the Assistant Prosecutor. The record is bereft of any mention at that time of the Multiple Offender Statute for narcotics violators by the state or the court.

This reasonable expectation of Petitioner was clearly subverted by Judge Leopizzi's illegal sentence. The opportunity afforded Petitioner by Judge McGlynn to withdraw his guilty plea was manifestly unfair since Petitioner had already begun to fulfill his part of the original plea bargain and could not be returned to the *status quo* for purposes of a trial.

To affirm Judge McGlynn's subsequent "legitimization" of the original sentence would be to elevate form over substance and to allow Petitioner's Fourteenth Amendment right to due process to be violated. It would also undermine the plea bargining process by casting a shadow over the procedures which resulted in the waiver of important constitutional rights.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Superior Court of New Jersey, Appellate Division.

RAYMOND A. BROWN
Attorney for Petitioner

APPENDIX A

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION—A-2319-74

STATE OF NEW JERSEY,
Plaintiff-Respondent,

—v—

JAMES BROCKINGTON,
Defendant-Appellant.

Submitted March 1, 1976.

Decided March 16, 1976.

Before Judges Carton, Crahay and Handler.

On appeal from Essex County Court.

Messrs. Brown, Vogelman & Ashley, attorneys for appellant (Mr. Raymond M. Brown & Mr. Thomas R. Ashley, on the brief).

Mr. Joseph P. Lordi, Essex County Prosecutor, attorney for respondent (Mr. Steven Isaacson, Assistant Prosecutor, of counsel).

PER CURIAM

Appendix A

In a four count indictment defendant was charged with 1) conspiracy to violate the narcotic laws—N.J.S.A. 24:21-24; 2) distribution of cocaine—N.J.S.A. 24:21-19(a)(1); 3) possession of cocaine—N.J.S.A. 24:21-20, and 4) possession of cocaine with the intent to distribute it—N.J.S.A. 24:21-19(a). Pursuant to a bargained plea, defendant pled guilty to the offense of distributing cocaine. The remaining counts were dismissed and defendant was sentenced to an 18 to 20 year term at New Jersey State Prison.

Defendant, 43 years of age, suffered an extensive criminal record. The transaction here involved the sale of 70 plus grams of cocaine to a police undercover agent for $1,850.

The sentence imposed was illegal, the maximum statutory penalty for the offense being 12 years. At the sentencing hearing the prosecution stated it was urging that the maximum sentence be imposed. At the *retraxit* hearing the trial court had stated to defendant that the maximum sentence was 12 years.

Defendant thereafter moved to have the sentence reduced. The trial judge (one other than the original sentencing judge who had been transferred to another county) advised defense counsel that he would permit defendant to withdraw his plea of guilty and stand trial on the indictment. Defendant persisted in the claim that he was entitled to be sentenced to a prison term with a maximum of 12 years. It was stated that the original sentencing judge did not indicate whether defendant was being sentenced as an habitual offender. The trial court stated that it was not bound by any plea bargaining agreement and that in such a posture defendant had the opportunity to withdraw the plea and stand trial.

Appendix A

The court below concluded that if the original sentencing judge intended to punish defendant in excess of the statutory maximum, as a multiple offender, he did not accord defendant the due process safe-guards called for by *State* v. *Booker*, 88 N.J. Super. 510 (App. Div. 1965) *i.e.*, notice of, and opportunity to be heard on prior offenses before suffering enhanced penalty. The original sentence was set aside as illegal. Defendant chose not to withdraw his guilty plea and was later served with an accusation charging him under N.J.S.A. 24:21-29 with two prior convictions—

I. In 1962, in the United States District Court for the District of New Jersey, for violation of 26 U.S.C.A. 4744(a), the unlawful possession of marijuana without payment of the required federal transfer tax for which he received a four year federal prison term;

and

II. In 1959, in the Essex County Court, for violation of N.J.S.A. 24:18-4, the unlawful possession of cocaine for which he was sentenced to a term of two to three years.

Defendant personally waived his right to a jury trial on the accusation and was found guilty of being an habitual offender thereby exposing him to a 24 year maximum prison term.

A sentence of 18 to 20 years in State Prison was ordered. On this appeal, defendant does not challenge his conviction as a subsequent offender but asserts solely that—

Appendix A

> The original plea bargain entered into by defendant and the prosecutor should be specifically enforced under the terms originally agreed upon.

Our review of defendant's arguments against the record satisfies us that there was no illegality in the procedure employed nor basic unfairness to defendant warranting reversal and we affirm.

First, for the purposes of our disposition, we assume —the record is not absolutely clear on the point—that there was in fact an agreement that in exchange for defendant's guilty plea the prosecution would move to dismiss the balance of the indictment and specifically recommend a maximum sentence of 12 years. We will further assume that the defendant, the prosecution, and the trial judge at the time of the *retraxit* hearing did not contemplate employment of the subsequent offender act—N.J.S.A. 24:21-29. Thus for the purposes of squarely addressing the issue, at the close of the *retraxit* hearing we view that the defendant contemplated that the State had unequivocally agreed that his maximum sentence would be limited to not more than 12 years. Must such an agreement be specifically enforced? We are satisfied not only that it need not be but that on this record such a step might have been counterindicated.

Defendant essentially seems to argue that upon the acceptance of his plea at the *retraxit* hearing he then enjoyed an inalterable vested right to a sentence not exceeding 12 years, the statutory maximum, and that being so, there could not have been any further consideration of possible subsequent offender treatment. We know of no decisional mandate to this end nor do we perceive any reasonable basis, on this record, for adopting it. Defendant suffered no fundamental unfairness. The public interest was also to be served.

Appendix A

Plea bargaining in criminal matters is a significant tool in the administration of justice and has been encouraged. *Santobello* v. *New York*, 404 U.S. 257 (1971). The terms of plea agreements must be meticulously adhered to and a defendant's reasonable expectations generated by plea negotiations should be accorded deference. *State* v. *Jones*, 66 N.J. 524 (1975); *State* v. *Thomas*, 61 N.J. 314 (1972) and *State* v. *Poli*, 112 N.J. Super. 374 (App. Div. 1970). It does not follow from these principles that a defendant may insist that he has a right to a stated term of years imprisonment on the grounds that a judge at a *retraxit* or plea hearing indicated that such a term represented defendant's total penal exposure.

Defendant cites *Santobello, supra*. to us, but that authority does not support his claim. Here, there was no breach of any agreement by the State. The subsequent offender action leading to the sentence here challenged was initiated by the court. Unlike *Santobello*, the prosecutor in this matter did not promise not to make any recommendation as to the *quantum* of sentence and thereafter breach such a promise.

The highest authority instructs that there is no absolute right to have a plea accepted and sound discretion may lead to the rejection of such a plea. *Santobello, supra* at 262. *State* v. *Thomas, supra*, at 321. R. 3:9-3(d).

It is the sentencing judge, exercising sound discretion, who in each case must decide in which way the public interest will best be served. *State* v. *Tyson*, 43 N.J. 411 (1964), *cert.* den. 380 U.S. 987 (1965); *State* v. *Ivan*, 33 N.J. 197, 201 (1960).

Appendix A

One reason for permitting wide discretion in the sentencing judge is that at the time a plea is entered ordinarily the court has before it only the offense. A fuller picture of the offender does not emerge until sentencing when the court has had the benefit of a defendant's presentence report. R. 3:21-2; *State* v. *Culver,* 40 N.J. Super. 427 (App. Div. 1956), modif. 23 N.J. 495 (1957), *cert.* den. 354 U.S. 925 (1957).

We are satisfied that if the court be bound to a plea agreement, regardless of what a defendant's presentence report reflects, there would exist a real potential that the public interest would be disserved.

We do not know what impelled the original sentencing judge to order a term of incarceration in excess of the statutory maximum. It might very well be that the action was taken, after reviewing defendant's presentence report, with the mistaken notion that, without more, the subsequent offender's statute was employable.

We iterate that defendant suffered no prejudice in the procedure followed. He had no vested interest in the plea agreement not yet approved by a court. He had the opportunity to withdraw the plea and stand trial. He chose not to do so knowing that his penal exposure would be doubled if adjudged guilty as a subsequent offender. N.J. S.A. 24:21-29. The court below acted with full warrant based upon its review of defendant's presentence report. That document is a sorry one. Defendant's adult court history, in addition to the two prior narcotics convictions, dates back to 1949. There are many other arrests, convictions and imprisonments for offenses other than narcotics violations. We cannot say that the trial court mis-

Appendix A

takenly used its discretion in not accepting the plea agreement as offered by defendant and ordering subsequent offender prosecution. On this record the stringent sentence ultimately imposed was not, in our view, unduly punitive.

Affirmed.

APPENDIX B

Order of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY
C-646 SEPTEMBER TERM 1975

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

JAMES R. BROCKINGTON,
Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied—with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 15th day of June, 1976.

FLORENCE R. PESKOE
Clerk

FILED
Jun 15 1976

FLORENCE R. PESKOE
Clerk